DATE: FEBRUARY 17, 1994
CASE NO. 93-ERA-00016

IN THE MATTER OF

THOMAS H. SMITH,
Complainant

v.

EBASCO CONSTRUCTORS, INC.
Respondent

Appearances:

Edward A. Slavin, Jr.
For the Complainant

Karen C. Geraghty, Esq.
For the Respondent

BEFORE: JAMES W. KERR, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Energy Reorganization Act of 1974, ("the Act"), as amended 42 U.S.C. § 5851, and its implementing regulations, 29 C.F.R. Part 24. Section 5851(a) of the Act prohibits a Nuclear Regulatory Commission ("NRC") licensee and its subcontractors from discharging or otherwise discriminating against an employee who has engaged in protected activities as set forth in the Act.

On December 16, 1991, Thomas H. Smith, ("Complainant") filed a complaint with the Department of Labor against his former employer, Ebasco Constructors, Inc. ("Respondent"), alleging that he was subjected to harassment and a hostile work environment in violation of the Act. On December 29, 1992, following an


investigation, the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, concluded that Complainant had not been terminated in retaliation for engaging in protected activities, but rather he had been terminated due to a reduction in force and given an eligibility rating for rehire.[1]

On December 31, 1992, Complainant appealed the Administrator's determinations by telegram to the Department of Labor's Chief Administrative Law Judge. The matter was docketed in the Office of Administrative Law Judges in Washington, D.C. on January 5, 1993, and assigned to this Court on January 11, 1993. On January 12, 1993, an Order immediately issued setting the case for a hearing on February 18, 1993, in Houston, Texas. After continuances were granted to both parties, the hearing was set for July 19, 1993.

The parties attended a pre-trial conference on July 19, 1993 in Houston, Texas and the hearing took place July 20, 1993, through July 22, 1993. Complainant was unrepresented at the hearing and proceeded *pro se*. The parties were afforded full opportunity to present evidence and argument. The findings and conclusions which follow are based upon the appearance and demeanor of the witnesses who testified at the hearing, analysis of the entire record, argument of the parties, and applicable regulations, statutes and case law precedent.[2]

Following the hearing post trial briefs were scheduled to be submitted on or before September 23, 1993. (Tr. at 713). However, on Complainant's Motion, the record was left open until November 19, 1993, for filing of Complainant's brief, with Respondent's being afforded the opportunity to submit a reply brief no later than November 29, 1993.

Complainant submitted his Post-hearing Brief accompanied by an Appearance of Counsel, Motion to Supplement the Record, and a Motion for Leave to File Rebuttal Brief. On November 24, 1993, Respondent submitted its opposition to Complainant's Motions and requested an Extension in which to file its response to Complainant's Post-trial brief. On December 1, 1993, this Court entered an Order Allowing Respondent an Extension of Time and Denying Complainant's Motion to File a Rebuttal Brief providing that Respondent's reply brief was due on or before December 17, 1993. On December 17, 1993, Respondent submitted its reply brief.

*Complainant's Motion to Supplement the Record*

Complainant's Motion to Supplement the Record requested that

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an additional page (Page 6) of Complainant's Exhibit No. 30, and Proposed Complainant's Exhibit Nos. 37 and 38, be admitted to the record. After review of the record this Court finds that Page 6 of CX-30 shall be admitted to the record. The record reflects that at the time that Respondent proffered "CX/RX-31" there was some confusion as to what that exhibit included. (Tr. at 648-657, 661, 705). Apparently, Page 6 of CX-30 is also a part of what was admitted as CX/RX-31 and is hereby admitted as its exclusion was an oversight. However, Complainant's Proposed Exhibit No. 37 and 38 are untimely and will not be made part of the record.

*Findings of Fact*

Houston Lighting and Power Company (HL&P) owns and operates South Texas Nuclear Project (STP) in Bay City, Texas. Respondent,

Ebasco Constructors, Inc., was the primary contractor in charge of the construction of STP and has been on the site since 1982. In 1987, as the construction of the plant was completed, Respondent contracted with HL&P to provide ongoing maintenance for the support and operation of STP.

In the course of maintenance of the STP facility, the units will go in and out of phases called "outages," during which routine and repair maintenance is performed. During these "outages" Respondent has a greater need for workers and will hire on to fill that need. Consequently, as the unit is reactivated and comes out of the "outage" the workers are laid off. This routine results in a constant hiring and releasing of workers.

*Thomas Smith*

Complainant, who is now 37 years of age, commenced his employment with Respondent in 1983 and worked at STP for more than eight years on and off until his most recent lay off December 20, 1991. Complainant was a member of the International Brotherhood of Carpenters union local used by Respondent in obtaining workers during a hiring period. Complainant began working at STP during the construction phase of that facility but was "rolled over" into the maintenance phase on February 7, 1989, when construction of the facility was completed. Complainant had not been laid off at that juncture. (Tr. at 127-128). Following his roll over into maintenance, Complainant was laid off on several occasions.

Complainant testified that he recently underwent back surgery for a back condition he has suffered since a work related injury in 1983. He testified that by the fall of 1991 his back was bothering him to such an extent that he walked with a limp.

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Complainant bases his complaint on his contentions that after he voiced safety concerns to HL&P's "SPEAKOUT" association and to the Nuclear Regulatory Commission and Department of Labor, he was harassed, subjected to a hostile work environment, and eventually laid off. Specifically, Complainant alleges: 1) he was pushed toward going on workers' compensation and ultimately laid off for voicing safety concerns; 2) he was given three days suspension for not following proper procedures even though following a direct instruction from his foreman; 3) he was demoted from carpenter foreman to journeyman carpenter before his assignment was completed; 4) he was singled out and subjected to unprofessional behavior by supervisory personnel; 5) he was taken off-site to a doctor during work hours against his will; and 6) he was subjected to harassment and ridicule through derogatory cartoons drawn on a cafeteria chalk board.

Complainant testified that in early August of 1990 he became aware that Respondent was not adhering to either HL&P or OSHA procedures in its construction of scaffolds at STP. He stated that non-scaffold grade lumber was being used and that the scaffolds were being built oversized, without handrails and were being tied-

off improperly. Further, he stated that he approached his foreman, Billy Morgan about the matter.

Complainant testified that in August of 1990, after discussing the faulty scaffolding with his foreman, he reported the conditions to Joe Tapia, an investigator for the NRC. Further, he stated that this report initiated an investigation "walk through" by the NRC, which prompted Respondent to remove or repair some of the faulty scaffolds at STP. However, Complainant testified that Bob Pratt, an Ebasco scaffold engineer, instructed him to remove or repair only those scaffolds which were in highly visible areas.

Complainant testified that shortly thereafter, he was assigned to the "lay down" yard to remove lumber which Respondent wanted disposed of. He stated that the lumber he was instructed to throw away was scaffold grade lumber, yet scaffolds that were still in use were constructed of non-scaffold grade lumber. Complainant stated that he reported this matter to an executive of HL&P who handled the matter the following day. Complainant stated that he admitted to the Ebasco supervisors present the day the HL&P executive came to the yard that he had informed HL&P of the improper disposal of lumber.

Complainant testified of another incident in which he and a co-worker were instructed to do a job without a work package.

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Complainant testified that he was directly instructed to do this job despite the fact that the work package for that particular job could not be located. He stated that he, a co-worker and his foreman were reprimanded for this error and given three days suspension (after a grievance procedure they were given three days pay to divide between them as they saw fit). Complainant stated that this incident constituted harassment because work was routinely performed at STP without work packages and Ebasco had never taken action against any workers.

Complainant stated he approached representatives of SPEAKOUT on numerous occasions between 1990-1991 alleging violations ranging from improper welding/drilling procedures and supervisor misconduct to inappropriate work procedures. He stated that on most of these occasions he voiced concerns about the faulty scaffolding being used on the work site, as well as, behavior he perceived as harassment due to his complaints regarding the improper scaffolds.

Complainant stated that Respondent formed a special scaffold crew in October 1991. Complainant was made foreman of this crew and allowed to pick three carpenters to assist him in this project. Complainant's understanding of the goal of the special crew was to inspect and repair all of the scaffolds located at the site. Complainant stated that he was initially instructed to begin in Unit II, but that after three hours the crew had "danger tagged" approximately 38 of the scaffolds in that unit.[3]

Complainant stated that shortly after the crew began danger tagging the scaffolds he was called to the office of Larry George, an Ebasco supervisor, and instructed to stop inspecting Unit II and

to start instead in Unit I. Complainant stated that Unit II was in an outage phase and therefore the workers needed to use the scaffolds in that area and he believes Respondent removed the crew from Unit II for this purpose. Complainant stated that although the crew proceeded to Unit I and worked there for a period of weeks, they had completed repairing the scaffolds in the only a few of the areas before Respondent disbanded the special crew.

Complainant stated that shortly after the crew completed its work in these buildings and the special scaffold crew was disbanded he was "busted back" to a Journeyman Carpenter. Complainant testified that he did not think that all of the faulty scaffolds had been repaired and that Respondent disbanded the crew prematurely. Complainant felt his demotion was a form of harassment since the job he had been instructed to do was not complete.

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After the special crew was disbanded, Complainant was assigned to a crew with carpenters Kenny Strother, Everett Strother and Billy Morgan, with Jody Johnson as foreman. Complainant stated that he felt Mr. Johnson was harassing him. He testified that on one occasion, while he was acting as the "groundman" of the group Mr. Johnson approached and instructed Complainant to work on the scaffold because Mr. Johnson wanted Kenny Strother to be the "permanent groundman." Complainant testified that the crew members usually decided which carpenter worked a specific position. Complainant stated that he felt he was being harassed by Mr. Johnson because the foreman of a crew *never* decides which worker will perform which job. Moreover, he stated that Mr. Johnson's decision to make Mr. Strother the permanent groundman was unreasonable because Mr. Strother had a bad knee and could not do all the walking required of the groundman.

Complainant testified that while he was working on the special scaffold crew, in November 1991 one of Respondent's supervisors noticed that he was walking with a limp. Although the record is unclear about the exact course of events, Complainant was eventually taken to a doctor's office off-site, allegedly against his will, by Respondent's safety officer, Paul Ramon. Complainant feels he was being harassed by Respondent who was trying to put him on workers's compensation.

Complainant testified that he had reported numerous violations to the NRC through Joe Tapia. Complainant stated that he first informed Tapia of Respondent's practice of using substandard scaffold in the fall of 1990. He stated he spoke with Mr. Tapia again in 1991 after he had been instructed to throw away usable scaffold grade lumber. He contacted the NRC again when he was suspended for three days and felt he was being harassed for reporting safety concerns.

*Rick Cink*

Rick Cink, an HL&P employee and senior investigator with

SPEAKOUT testified at the hearing. Mr. Cink stated that although SPEAKOUT's first priority is to investigate nuclear safety and quality controls, it reserves the right to investigate other matters. He later clarified that statement by stating that concerns made to SPEAKOUT may be investigated by another department of HL&P or sent to Ebasco for investigation, depending on the subject matter of that concern and in fact, at least one of Complainant's concerns had been investigated by Ebasco personnel.

Mr. Cink testified that in an effort to maintain anonymity,

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SPEAKOUT documents employee concerns with "concern" numbers rather than with the employee's name. Although this system resulted in some confusion during Mr. Cink's testimony, he stated his records contained at least five different concern numbers that were generated by Complainant in 1990-1991. He testified that Complainant had expressed a concern regarding improper construction of scaffolds and of harassment.

*William Morgan*

William A. Morgan, a carpenter, was a scaffold foreman in 1990 when Complainant first voiced his concerns about the non-scaffold grade lumber being used on the scaffolds in the protected areas of STP. (Tr. at 407). Mr. Morgan testified that in 1990, Complainant approached him about the use of the substandard lumber and that he in turn initiated a conversation with the general foreman, James Kaminsky. (Tr. at 407). Mr. Morgan stated that in addition to himself, Kaminsky and Complainant, an Ebasco safety representative and an HL&P safety representative discussed the problem with the lumber. (Tr. at 413).

Mr. Morgan testified that the lumber being utilized to build the scaffolds was not the proper grade lumber. (Tr. at 414). Mr. Morgan testified that he was aware that Complainant had gone to the NRC. In fact, Mr. Morgan stated that he advised Complainant to go to the NRC. (Tr. at 415). Mr. Morgan stated that shortly after this discussion, he was instructed to remove all substandard lumber from the scaffolds and replace it with the proper grade lumber. He testified that not all of the substandard lumber had been removed from the scaffolds when the special crew was disbanded.

Further, Mr. Morgan testified that Mr. Kaminsky asked him why he would not "just... forget the matter and let things go." (Tr. at 418). And had pressured him to remove a danger tag from one of the scaffolds. (Tr. at 431).

Mr. Morgan testified that during the time Complainant was a carpenter foreman and he was on the special scaffold crew, the carpenter foremen's office was located in the cafeteria. He stated that a Dry-Erase board was located in the office area and that he had seen cartoons portraying Ebasco employees. He said he had seen four or five cartoons of the Complainant, although he could not recall specifically what the cartoons were. While not all of the cartoons depicted Complainant, Mr. Morgan testified that the majority of them did and that they appeared on the board for 1-

3 days or until a new drawing went up.

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Mr. Morgan further testified that although some of the cartoons were funny some were "tacky" and for the most part were attempts to "put people down." Mr. Morgan stated that he believed the cartoons were drawn by Terry Robinson, "the operator of the general foreman." Mr. Robinson was not Complainant's supervisor but was a general foreman, he worked with the equipment not with the carpenters. (Tr. at 433-435, 466).

Mr. Morgan testified that after the special scaffold crew was abolished he was on a crew working with Complainant under foreman Jody Johnson. He stated that Mr. Johnson instructed him to be the permanent "groundman" despite the fact that Complainant had been doing this job. He stated that the crew usually decides which member does what job - not the foreman, and he did not know why Mr. Johnson was taking this position. When the Court asked Mr. Morgan how he interpreted Mr. Johnson's instruction that he be the permanent ground man, Mr. Morgan replied, "I really don't know what he meant by that. That is just something we have never did."

*Toni Smith*

Toni Smith, Complainant's wife and a quality control inspector for HL&P, testified that she had seen the cartoons of Complainant in the cafeteria. Specifically she described the following:

> [I]t was a picture of you, kind of like as a judge. You had medals on your chest for SPEAKOUT and NRC on it. And there was different people out in front of you that you were kind of chastising, you know, the way the picture was showing it.

(Tr. at 483).

*Kenneth Strother*

Mr. Kenneth Strother, a carpenter and Ebasco employee, testified that he worked the special scaffold crew with Complainant. He stated that the faulty scaffolds were either repaired or removed. (Tr. at 529). He was also working with the Complainant when Jody Johnson made Mr. Morgan the permanent groundman. Mr. Strother testified that the foreman on a job does not usually designate what duties each worker will perform. (Tr. at 539).

Complainant submitted a December 5, 1991, letter he had

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written to Casey David, Ebasco Labor relations officer, stating that he believed he was being harassed by his foreman, Jody Johnson, because he had made complaints to SPEAKOUT and the NRC. (CX-23). Further, Complainant's Exhibit No. 30 at 6, indicates

that supervisors for Respondent had knowledge that Complainant went to the NRC with safety concerns.

***FINDINGS OF FACT AND CONCLUSIONS OF LAW***

The basis of Complainant's claim is that Respondent subjected him to harassment and a hostile work environment and was eventually laid off in violation of 42 U.S.C. §5851(a) which provides that no employer subject to the Act "may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, condition, or privileges of employment" because the employee engaged in protected activity.

In making out his claim, Complainant must prove by a preponderance of the evidence that he was the subject of an illegal employment action. In order to establish a *prima facie* case of retaliation, Complainant must prove each of the following four elements: 1) the employee's engagement in a protected activity; 2) the employer's knowledge or awareness of the employee's engagement in a protected activity; 3) the employer's subsequent employment action adversely affecting the employee; and 4) that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. Further, under the Act, the complainant always bears the burden of proof or persuasion that intentional discrimination has occurred. *Darty v. Zack Co.*, 82-ERA-2 (April 25, 1983).

*Protected Activity*

This case arises within the jurisdiction of the United Stated Court of Appeals Fifth Circuit. In *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), the Court held that "employee conduct which does not involve the employee's contact or involvement with a competent organ of government is not protected under Section 5851," and does not apply to protect employee from repercussion from the filing of purely internal quality control reports or complaints.

This Court is well aware, however, that in other jurisdictions, the filing of purely internal quality control reports is considered a covered activity under Section 5851 of the Act. *See e.g. Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). Nevertheless, this Court finds that the evidence indicates that Complainant made complaints to both HL&P's

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SPEAKOUT organization and to the NRC concerning Respondent's failure to follow proper procedure in building scaffolds at STP; thus, the *Brown & Root* distinction would not work to dismiss his complaint.

Further, a complaint or charge of employer retaliation because of safety and quality control activities is protected activity under the Act and the record supports a finding that Complainant made allegations of discriminatory treatment based on his voicing safety concerns to both SPEAKOUT and the NRC. *McCuistion v.*

*Tennessee Valley Authority*, 89-ERA-6 (Sec'y 11-13-91).

*Knowledge of Protected Activity*

The record reflects that the supervisory personnel at Ebasco knew of Complainant's protected activity. William Morgan, Complainant's foreman at the time Complainant first voiced his concerns that Respondent was not following proper scaffolding procedures, testified that he knew that Complainant had gone to the NRC. (Tr. at 415). Further, Complainant's December 5, 1991 letter to Respondent's Labor Relations representative, Casey Davis, stated that he had gone to the NRC and that he felt he was being harassed because he had done so. (CX-22).

This Court also found convincing Toni Smith's testimony that the drawings of Complainant, appearing on the cafeteria chalk board, showed Complainant with SPEAKOUT and NRC buttons on his chest and that these drawings were in plan sight where Respondent's supervisors could view them. Mr. Cink testified that it was SPEAKOUT's policy to have Ebasco personnel investigate some of the concerns lodged by employees and in fact, had done so with at least one of Complainant's concerns.

This evidence supports a finding that Respondent knew that Complainant had gone to both SPEAKOUT and the NRC. Apparently, Complainant had a reputation for voicing his concerns. This Court finds that Mr. Morgan's testimony that he knew of Complainant's having gone to the NRC, as well as, the witness testimony concerning the cafeteria chalk board and presence of supervisory personnel in the cafeteria supports a conclusion that Respondent had knowledge of Complainant's protected activity.

*Action Adversely Affecting Complainant*

Complainant alleges numerous actions by Respondent as retaliation for his protected activity. Complainant first alleges

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that he was pushed to go on worker's compensation and was eventually laid off as a result of his protected activity and second that he was subject to a hostile work environment.[4]

Turning to Complainant's first allegation, this Court finds that Respondent's practice of hiring and laying off in response to the occurrence of "outages" at STP, was a normal business practice. In fact, Complainant had been laid off on more than one occasion in the eight years that he worked for Respondent. Complainant testified at the hearing that he was laid off and he had not been terminated for any other reason. Further, Respondent released Complainant off with a re-hire eligibility and with the highest ranking in five of six categories on his termination evaluation. The record is clear that Complainant has let his membership in the carpenters' union lapse and that he has not been released to return to work by his physician. Consequently, Respondent cannot re-hire him.

Further, the evidence does not support a conclusion that Complainant was "forced" onto workers' compensation. The fact that he has undergone surgery and is still recovering from that surgery indicates that his physical problems were real. As discussed below, this Court does not find that Respondent's having taken Complainant to a doctor in response to his noticeably limping at work is sufficient evidence to support a finding that Respondent had any malignant intent.

This Court finds that the evidence does not support the conclusion that Complainant was laid off due to his protected activity. Having failed to establish a causal connection between his protected activity and his separation from the company, this Court turns to the issue of whether there is sufficient evidence to support Complainant's contention that he was subjected to a hostile work environment as a result of voicing safety concerns.

Complainant contends that he was subject to harassment in several ways, as follows:

1) he was given three days suspension for not following proper procedures when following a direct instruction from his foreman;

2) he was demoted from carpenter foreman to journeyman carpenter before his assignment was completed;

3) he was singled out and subjected to unprofessional behavior by supervisory personnel;

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4) he was taken off-site to a doctor during work hours against his will; and

5) he was subjected to harassment and ridicule through derogatory cartoons drawn on a cafeteria chalk board.

The Act provides that an employer may not discriminate against an employee for engaging in protected activities. In *English v. General Dynamics Corp.*, 85-ERA-2 (Sec'y February, 13, 1992), the Secretary interpreted the Act to protect employees not only from retaliatory discharge but also from a hostile work environment which would amount to harassment at the work place. In that case, the Secretary suggested that *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, (1986), a Title VII case, would provide guidance in determining what conduct would amount to harassment under a hostile work environment theory.[5]

The Supreme Court in *Meritor Savings Bank*, defined the type of conduct which would amount to a hostile work environment. In that case, the Court stated that for harassment to be actionable, it must be sufficiently severe or pervasive so as to alter the condition of the employee's employment and create an abusive working environment. 477 U.S. at 67. However, the Court noted that in *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1980),

the first case to recognize a cause of action based upon a discriminatory work environment, a "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not effect the conditions of employment to a sufficiently significant degree to violate Title VII." 477 U.S. at 67.

Further, cases in the Fifth Circuit have held that without a showing of a tangible job detriment an employee must show a commensurately higher showing that the harassing conduct was pervasive and destructive of the work environment. *Jones v. Flagship International*, 793 F.2d 714, 720 (5th Cir. 1987), *cert. denied*, 479 U.S. 1065; *Rogers*, 454 F.2d at 238.

In the instant case, this Court finds that Complainant has not established that he suffered a hostile working environment. In considering Complainant's contention that he was subjected to harassment when he received a three day suspension for performing work without a work package, this Court finds that there is insufficient evidence to support Complainant's contention that he was singled out to be disciplined. The two other workers with whom he performed the job were also disciplined and Complainant himself acknowledged that either HL&P or Respondent's policies required

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that a work package be utilized with each job. This Court cannot find that Respondent's disciplining Complainant for violating policy is a form of harassment.

Complainant also contends that he was harassed when he was demoted from carpenter foreman to Journeyman Carpenter before the special crew to which he was assigned completed its task. However, the record is not clear regarding the full purpose of the crew. Although Complainant submitted a document apparently delineating the purpose of the crew, the evidence was equivocal regarding whether the job was completed. While Complainant testified that there were faulty scaffolds which were left unrepaired, Mr. Strother testified that all of the improper scaffolds were either repaired or removed. This Court finds that the assignment of an employee to a foreman position and the subsequent demotion of that employee back to a Journeyman status, is solely the prerogative of Respondent. The evidence presented was insufficient to prove that Complainant's demotion was motivated by anything other than a decision by Respondent that the job was either complete or no longer worthy of special attention.

Next, Complaint alleges that his foreman, Jody Johnson, came out to the work site and ordered him onto a scaffold when his back was bothering him. While the testimony of other witnesses confirmed that it was highly unusual for the foreman to designate which worker would perform which job, the foreman is in charge of a work crew and, in that supervisory role, has the authority to direct the workers under him. Again, Complainant's evidence falls short of the mark of establishing that the conduct of Respondent or its employees rises to the level of harassment. While the Court found Complainant's testimony credible in his recitation of the facts, he has not established as a matter of law that these facts

amount to harassment.

In regard to Complainant's accusation that he was taken off-site to a doctor as a form of harassment, this Court is hesitant to find Respondent acted in a malevolent manner. Complainant clearly was injured as evidenced by the fact that he eventually required surgery for the condition for which Respondent took him to the doctor. Furthermore, the record is not clear that Complainant expressed an aversion to leaving at the time Respondent took him to see a physician.

Finally, Complainant contends that the cartoons drawn on the cafeteria chalk board were disparaging and were a form of harassment. Witnesses testified that the cartoons portrayed Complainant in a rather negative light and were insulting. This Court finds that the cartoons were most certainly of an abusive and harassing nature. Further, the record indicates that Respondent's supervisory personnel were probably aware of the presence of the drawings. However, while this Court believes it was Respondent's responsibility to not only remove the drawings but also to find the "artist" and remedy the situation to ensure that it would not continue, this Court is not convinced that the display of these cartoons rises to a level of conduct that subjected Complainant to a hostile working environment.

It is unclear what the cartoons depicted, how many of the cartoons were displayed and for how long they were displayed. Thus, the Court is unable to determine if the conduct was sufficiently severe and pervasive to create a hostile work environment. Further, Complainant did not establish what term, condition or privilege of his employment was effected by the cartoons. This Court finds that the fact that Complainant may have been offended by the cartoons is not, in and of itself, enough to establish a hostile work environment. *See Rogers*, supra.

*Conclusion*

Complainant, while credible, has not proved that as a matter of law he should prevail. While Respondent's actions, may have had an adverse effect on Complainant, they do not amount to retaliatory employment action as a matter of law. In sum, Complainant has not met his burden of proof or persuasion in proving a violation of the Act.

*Recommended Decision*

This Court hereby recommends to the Secretary of Labor that the complaint of Thomas H. Smith against Ebasco Constructors, Inc. be DISMISSED.

Entered this 17th day of February, 1994 at Metairie, Louisiana.

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JAMES W. KERR, JR.
Administrative Law Judge

JWK/kr

[ENDNOTES]

[1] Complainant was originally notified of the results of the Department of Labor's investigation in a December 29, 1992, letter reflecting HL&P as the Respondent in the case. However, a corrected copy of the same letter went out on January 26, 1993, listing Ebasco Constructors, Inc. as the Respondent.

[2] The following abbreviations will be used throughout this decision when citing the evidence of record: Complainant's Exhibit - "CX;" Respondent's Exhibit - "RX;" Joint Exhibit - "JX;" June 19-22, 1993, Hearing Transcript - "Tr.;" August 3, 1993, Conference Call Transcript - "Supp. Tr."

[3] Complainant explained that a scaffold which was danger-tagged could not be used by workers.

[4] It is important to note that while in his post hearing brief Complainant argues that his December, 1991 lay off was retaliatory action by Respondent, he stated at the hearing that he was laid off due to a reduction in force, which was a normal practice in his work with Ebasco. Specifically, Complainant stated that he did not understand why the investigator from the Wage and Hour Division of the Department of Labor made a finding that he had not been terminated in retaliation for voicing safety concerns when he had not alleged that he had. In fact, Complainant's statement to the Department of Labor was made on December 16, 1991, days before his December 20, 1991 lay off.

[5] Title VII of the Civil Rights Act of 1964, makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. The Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.* (amended 1991).

The Civil Rights Act provides that to establish a prima facie case of retaliation an employee must show: 1)that she engaged in an activity protected by Title VII; 2) that an adverse employment action followed; and 3) that there was some causal connection between the activity and the adverse action.

To establish a prima facia case of sexual harassment under the hostile work environment theory an employee must show: 1) that she belongs to a protected group; 2) that she was subject to unwelcome sexual harassment; 3) that he harassment was based on sex; 4) that the harassment affected a term or condition or privilege of employment; and 5) if appropriate some ground to

hold the employer liable. *Collins v. Baptist Memorial Geriatric Center*, 937 F.2d 190 (5th Cir. 1991).